

Office of the Attorney General  
State of LOUISIANA

Opinion No. 82-1082  
December 28, 1982

90-A-1 POLITICAL SUBDIVISIONS, OFFICERS, AGENTS & EMPLOYEES

(1) It is not legal for a public employee to be paid vacation pay and during the same pay period receive his regular salary, notwithstanding an agreement that the employee will later take a vacation without pay. (2) Injured public employees cannot be paid unearned wages in excess of the amount provided by law for workmen's compensation. (3) It is not legal for a public employee to be paid his regular salary when he does not work, but pays someone else to work for him.

Mr. Dan E. Melichar, Esq.  
City Attorney  
City of Pineville  
P.O. Box 1306  
Alexandria, LOUISIANA 71309

Dear Mr. Melichar:

Your letter dated November 4, 1982, to Attorney General William J. Guste, Jr., has been referred to me for reply.

You have requested that our office issue its opinion in answer to three questions:

- (1) Is it legal for the City to give vacation pay to its employees in lieu of vacation with the understanding that the employees later make this up by taking a vacation without pay?
- (2) The City's practice is to continue to make salary payments to employees who have been injured and who have made workmen's compensation claims with the understanding that the City is later reimbursed by accepting the claimant's benefit check from the compensation insurer. Does this violate Article 7, Section 4 of the LOUISIANA Constitution as being a loan of public funds?
- (3) Is it legal for city employees to arrange for someone to work in their place when they want to take off? The worker who lays off receives his usual pay for the pay period and then he pays the replacement worker from his own salary?

In answer to your first question we are enclosing a copy of Opinion 78-657 of our office which we believe is a thorough analysis of the first question you ask. Please note that the enclosed opinion concludes that an employee cannot

be classified as having more than one status for any given period of time. Accordingly, for the same reasons, the answer to your first question is that such a practice is not legal.

An injured employee is eligible to receive workmen's compensation payments from his employer if he receives personal injury by accident arising out of and in the course of his employment. (R.S. 23:1031, et seq.) The eligibility to receive and amount of the payment depends upon the nature and duration of the injury, as well as his wages. Those factors must be determined on a case by case basis, and must be made and documented prior to any payment, other than for earned sick or annual leave.

Your second question does not state whether or not the injured employee had returned to work when the city continued to pay him full salary. We cannot assume that he did or did not because our analysis of the law leads to a different result for each status.

We call your attention to the following language in the case of *Lewing v. Vancouver Plywood Co., Inc.*, 350 So. 2d 1320:

When an injured employee returns to work and is paid his salary, in order to determine whether the employer is entitled to a credit for wages paid to the employee, it is necessary to ascertain whether or not the employee 'actually earned' the wages. If the wages are actually earned by the employee the employer is not entitled to a credit for the amounts paid. However, the employer is entitled to a credit for wages if they were unearned, as they may be said to be in lieu of compensation. Whether or not wages are earned is a factual determination to be made in each case.

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Our law is well settled that an employer is entitled to one week's credit for each week that he pays the injured employee a sum equal to or greater than the amount due the employee under our workmen's compensation laws. In order for the employer to be allowed credit for amounts paid in excess of the amount of compensation payments due, there must be an agreement between the employer and employee to that effect.

We note that the practice of paying an injured employee amounts in excess of the amount of compensation payments due is a common practice in private enterprise; however, where the expenditure is from the public fisc, such a practice must be scrutinized. If the employer is to receive a credit for the excess payments, two conditions must be met: (1) the payment must have been for 'unearned' wages, and (2) there must be an agreement between the employer and the employee clearly stating that the employer will claim and the employee agrees to allow his credit for the excess payments.

It is our opinion that it is unlawful for a public employee to be paid unearned wages. Such a payment would be a donation prohibited by the LOUISIANA Constitution of 1974, Article 7, Section 14. (Opinion No. 76-1492, copy enclosed) The existence of an agreement as described above would not cause a

change in our opinion for the reason that one can never be certain that the injured employee will return to work, and, if he does not the employer will never realize the credit due.

We do believe, however, that there is a lawful method for the city to accomplish its purpose, i.e. an employee's continued receipt of the amount of his regular salary. The employee may be paid full wages for 'earned' sick leave or 'earned' annual leave; alternatively, the employee may combine one or the other or both with workmen's compensation benefits to equal his regular salary. We emphasize that this method is lawful only if, and to the extent that, the employee has 'earned' sick or annual leave available. The practical application of this method is beyond the scope of this opinion; nevertheless, we suggest that an excellent discussion and legal analysis has been given by the Court of Appeal, First Circuit, in *Basco v. State of LOUISIANA, Department of Corrections*, 335 So.2d 457.

Your final question involves the issue of a public body paying its employee through a third party, albeit the third party may also be an employee. This practice is foreign to any standards of governmental accounting of which we are aware. Aside from the issues of claims for benefits for time worked, the employee who has actually worked may have claims for overtime against the city. What of the situation when the co-worker fails to pay? Does not the worker still have a claim against the public fisc? What of the employee who is injured while working for the co-employee? Whose employee is he for purposes of workmen's compensation? Would a proper defense be that he was the employee of the co-worker at that time under a labor contract? To allow such a practice would be a transformation of the employer-employee business relation to that of owner-contractor. The principles of law applicable to each are entirely different. More importantly, though, the employee who is paid by the city would be receiving compensation for services he did not perform. We do not believe that it is a defense for him to pay someone else to work for him. Such is not a recognized status of a public employee in accordance with generally accepted auditing standards. Our reasons for this conclusion are the same as stated in our enclosed Opinion No. 78-657. Accordingly, it is our opinion that such a practice is not permissible.

We trust that we have adequately answered your questions. If we may be of any assistance to you in the future, please do not hesitate to call upon us.

Sincerely yours,

William J. Guste, Jr  
Attorney General

By: Stephen J. Caire  
Assistant Attorney General

La. Atty. Gen. Op. No. 82-1082, 1982 WL 186160 (La.A.G.)  
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